RE LEONG LAM KAI; EX P RHB BANK BHD

HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J
[BANKRUPTCY NO: D8-29-1509-2004]
3 NOVEMBER 2008

BANKRUPTCY: *Creditor's petition - Presentation of - Judgment creditor failed to state that it was secured creditor - Whether in breach of s. 5(2) Bankruptcy Act 1967 - Whether fatal to petition*

This was the judgment debtor's appeal against the decision of the Senior Assistant Registrar dismissing the judgment debtor's application to set aside the judgment creditor's petition. It was argued for the judgment debtor ('JD') that the judgment creditor ('JC') failed to declare that it was a secured creditor and was in breach of s. 5(2) of the Bankruptcy Act 1967. On the contrary, the JC erroneously affirmed that it had not held any security of the JD's debt. Against this, the JC argued that such an error was not fatal to the petition. The case of *In re Small, Westminister Bank v. Trustee* ('*In Re Small*') was cited in support.

Held (allowing the appeal):

(1) The JC was not speaking the truth by stating the untruth that it was not a secured creditor. The courts do not take kindly to a petition which did not comply with s. 5(2) of the Bankruptcy Act 1967 and would readily set aside the petition. The case of *In Re Small* was distinguished as the application to set aside therein was made after the judgment debtor was made a bankrupt. (para 6)

Case(s) referred to:
Hongkong & Shanghai Banking Corp v. Yip Kim Khoon [1991] 3 MLJ 172 ***(refd)***
In re Small. Westminster Bank v. Trustee [1934] 1 Ch 541 ***(refd)***
M Hashimi Ibrahim v. Asia Commercial Finance (M) Bhd [2002] 5 CLJ 25 HC ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, s. 5(1)(a), (2)
Interpretation Acts 1948 and 1967, s. 17A

Bankruptcy Act 1914 [UK], s. 4(2)

Other source(s) referred to:
Khoo Kay Ping, *The Law and Practice of Bankruptcy in Malaysia,* p 87

For the judgment creditor - Andrew Teh; M/s Wong Lu Peen & Tunku Alina
For the judgment debtor - K Indran; M/s Krishna Dallumah, Manian & Indran

Reported by Usha Thiagarajah

JUDGMENT

Kang Hwee Gee J:

This Is My Oral Judgment: ***(ex-tempore)***

[1] This is an appeal by the judgment debtor against the decision of the senior assistant registrar in disallowing the judgment debtor's application to set aside the creditor's petition.

[2] The debt arose from a judgment obtained by the judgment creditor in respect of its loan granted by the judgment creditor to the judgment debtor. The loan was also secured by an equitable charge (by a deed of assignment) on the judgment debtor's land. The judgment creditor proceeded to recover the loan both by claiming the loan sum and exercising its right of sale under the deed of assignment. In the course of the petition the land was sold to a third party for a sum of RM80,484.09 thereby leaving a shortfall of RM166,124.26 over the presentation sum of RM246,608.35.

[3] Mr. K. Indran For The Judgment Debtor

i. The main ground is that the judgment creditor failed to declare that they were secured creditor by the equitable charge of the condominium which was sold after the presentation of the creditor's petition and the service of the bankruptcy notice on the judgment debtor. This is in breach of s. 5(2) of the Bankruptcy Act 1967 which reads as follows:

> If the petitioning creditor is a secured creditor he must in his petition either state that he is willing to give up his security for the benefit of the creditors in the event of the debtor being adjudged bankrupt or give an estimate of the value of his security. In the latter case he may to the extent

of the balance of the debt due to him, after deducting the value so estimated, be admitted as a petitioning creditor in the same manner as if he were an unsecured creditor.

ii. When it presented the petition the judgment creditor was a secured creditor and he ought to have elected whether he was willing to give up his security or alternatively he had to give an estimate of the value of the property.

iii. Authorities: See *M Hashimi Ibrahim v. Asia Commercial Finance (M) Bhd* [2002] 5 CLJ 25 per Nik Hashim J as he then was at 31:

> Being a secured creditor, the respondent creditor should have stated the truck under the hire purchase agreement as a security at para. 3 in the petition, giving its estimated value or stating that it has a security which it is willing to give up as provided for in s. 5(2) of the Act. In the present case, the respondent creditor failed to state that in its petition. Section 5(2) is mandatory in its provision; therefore it must be complied with strictly.

See *Hongkong & Shanghai Banking Corp v. Yip Kim Khoon* [1991] 3 MLJ 172 per Shaik Daud J as he then was at 174:

> Thus in this petition the judgment debtor (Yip Kim Khoon) is entitled to the benefit of the security (the assigned property) which the creditor has against the principal debtor (Bornion Company (KL) Sdn Bhd). In any case I feel that the word 'debtor' in s. 5(2) of the Act must be given a wider meaning than just the principal debtor. A surety against whom a judgment had been entered is for all intents and purposes a debtor to the judgment creditor.
>
> Since the judgment creditor had violated s. 5(2) of the Act and r. 101(2) of the Rules, I dismissed the petition.

See *The Law and Practice of Bankruptcy in Malaysia* by Khoo Kay Ping at p. 87:

> Where the secured creditor elects to give up the security, it will be realised for the benefit of the creditors who prove their debts. Section 5(2) of the Act. Where he is not willing to do so, he may keep the security for himself and deal with it any way he is entitled to and petition for the bankruptcy of the debtor based on the difference between the debt and the estimated value off the security. *Ibid.* The

A security must be disclosed and an estimated value thereof must be given in the petition. Failure to do so will render the petition defective. *Moor v. Anglo-Italian Bank* [1879] 10 Ch D 681 at p 689 para 3 (HC, England (Jessel MR)).

B iv. Now see the petition and the verifying affidavit of the petition encl. 1: nowhere was it stated that the petitioner had made an election whether it is prepared to give up the security or alternatively to provide an estimated value of the property he has taken under the charge. On the contrary it had erroneously affirmed that it had not held any security of the C judgment debtor's debt.

[4] Mr. Andrew Teh For The Judgment Creditor

i. It is admitted that there is an error in the verifying affidavit of D the petition but there are authorities to say that it is not fatal to the petition. See *In re Small. Westminster Bank v. Trustee* [1934] 1 Ch. 541 per Justice Farwell at 548:

> I can well appreciate that if there was any sort of doubt as to the amount of the security being less than the amount E of the petitioning creditor's debt, then the Court might hesitate long before allowing an amendment, but in the present case there is no possible doubt whatever that the petitioning creditors, even if they had done what they should have done and stated the security and valued it at F its proper value, would have been still entitled to the order which was made.

The case involved an application to set aside the adjudication order obtained on the ground of its failure to state the existence of a security in its petition under s. 4(2) of the G English Bankruptcy Act 1914 in *pari materia* with our s. 5(2) of the Bankruptcy Act 1967.

ii. In our case even after taking into consideration the value of the security against the sum owed the shortfall would still H come within the statutory minimum of RM30,000 required to present the bankruptcy petition under s. 5(1)(a). There are no local decisions supporting Justice Farwell. However Justice Farwell appeared to have considered the impugned section logically with a purposive approach consistent with the I requirement of s. 17A of the Interpretation Acts 1948 and 1967.

[5] Reply By Encik K. Indran

i. *Re Small* can be distinguished. There the application was made after AO and RO had been granted. Here in our case no such orders had been made. The judgment debtor is still not a bankrupt and he is only challenging the legality of the petition. Whereas in the former, it would be too late to reverse, in the latter it would be open to the judgment creditor to amend or to institute a fresh petition. Secondly in *re Small* the bank had completely overlooked and misled the court by omitting to state the debts they are claiming are secured. On the contrary the judgment creditor went a step further to declare that it was not a secured creditor.

Findings And Decision

[6] I would agree entirely with the submission of Mr. Indran that this petition should be set aside. It is obvious that the judgment creditor had not been speaking the truth by stating the untruth that it was not a secured creditor. The court in our jurisdiction does not take kindly to a petition which does not comply with s. 5(2) of the Bankruptcy Act 1967 and will readily set aside the petition. I would agree that *re Small* can be distinguished as the application to set aside was made after the judgment debtor was made a bankrupt. Justice Farwell had adopted the purposive approach as it was clear in that case that even taking into account the value of the security charged it would still be legitimate to make the judgment debtor a bankrupt as the sum he owed was well above the statutory minimum of £50; the debt owed was £16,000 and the value of the security was only between £5,000 and £6,000.

[7] The appeal is allowed with costs.